

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
TACOMA DIVISION**

BELGAU, *et al.*,

Plaintiffs,

v.

INSLEE, *et al.*,

Defendants.

Case No. 3:18-cv-05620-RJB

**JOINT STATUS REPORT and  
DISCOVERY PLAN**

Plaintiffs and Defendants jointly submit this Joint Status Report and Discovery Plan, pursuant to the Court's Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement, dated August 14, 2018 (Dkt. 20), Fed. R. Civ. P. 26, and Local Civil Rule 26.

**1. Nature and Complexity of the Case.**

**A. Plaintiffs' Brief Statement of the Case:**

This class action case seeks to enforce the United States Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), which acknowledged the "abuse" public employees have suffered under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) at the hands of union executives and public employers who for

1 decades illegally confiscated billions of dollars from the wages of public employees in  
2 violation of the First Amendment. To end the abuses, the U.S. Supreme Court  
3 acknowledged that the First Amendment guarantees to every public employee the right to  
4 refrain from financially supporting a union and secures this right by requiring that an  
5 “agency fee” or “any other payment” to a union be preceded by consent which constitutes  
6 clear and compelling evidence that employees waived that First Amendment right. 138 S.  
7 Ct. at 2486.

8 Plaintiffs are Washington State Public employees who were union nonmembers  
9 upon hire and, as such, possessed the right guaranteed by the First Amendment to refrain  
10 from financially supporting a union. At the time union nonmembers such as Plaintiffs  
11 allegedly consent to union payments, those “nonmembers are waiving their First  
12 Amendment rights, and such a waiver cannot be presumed.” *Id.* at 2486. The Supreme  
13 Court in *Janus* stated that “clear and compelling evidence” must be shown by parties  
14 seeking to overcome the presumption against constitutional waivers. *Id.* Thus the relevant  
15 legal issues in this case are twofold. First, what constitutes clear and compelling evidence  
16 of consent which amounts to a constitutional waiver? Second, have Defendants offered  
17 clear and compelling evidence that Plaintiffs’ consent to union dues deductions amounted  
18 to a waiver of their constitutional rights? *Janus* and the well-established case law cited in  
19 *Janus* by the Supreme Court show that “clear and compelling evidence” of the necessary  
20 consent requires that a constitutional waiver to be freely given and knowing. Defendants  
21 denied Plaintiffs such a waiver.

22 Any argument that the First Amendment protections articulated in *Janus* do not  
23 apply to newly-hired nonunion public employees, such as Plaintiffs, who allegedly  
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1 consent to union payments by signing union cards purporting to authorize such payments  
2 even over employee objections presumes such employees waived their constitutional  
3 right to refrain from making such payments. This violates *Janus*.

4 The relevant facts in this case are undisputed. Defendants cannot, as a matter of  
5 law, offer clear and compelling evidence that Plaintiffs' consent amounts to a freely  
6 given and knowing constitutional waiver. Plaintiffs will seek summary judgment to  
7 resolve this case in their favor.

8 **B. Defendants' Brief Statement of the Case:**

9 Plaintiffs are seven state employees in bargaining units that are represented for  
10 purposes of collective bargaining by Defendant Washington Federation of State  
11 Employees, AFSCME Council 28 ("WFSE" or the "Union"). They each affirmatively  
12 exercised their First Amendment right to join their Union by voluntarily signing WFSE  
13 membership cards. The membership cards each Plaintiff signed contained an agreement  
14 in which the Plaintiffs contractually committed to paying the amount of union dues for  
15 one year, regardless of whether they later decided to resign from union membership prior  
16 to the expiration of that one-year period. In exchange, they each became members of the  
17 Union, with the right to participate in internal union affairs and access to members-only  
18 benefits made available by the Union.

19 On June 27, 2018, the Supreme Court decided *Janus v. AFSCME, Council 31*, 138  
20 S. Ct. 2448 (2018), a case involving required fair-share fees paid by public employees  
21 who, unlike Plaintiffs, were *not* union members, did not voluntarily choose to join the  
22 union that represented them, and did not expressly and affirmatively authorize the  
23 payments. After *Janus*, each Plaintiff here resigned from membership in the Union.  
24

1 They then filed this lawsuit seeking to renege on their written contractual commitments  
2 to pay WFSE the remaining funds that they previously had agreed to pay.

3 This Court has already denied Plaintiffs' Motion for a Temporary Restraining  
4 Order (Dkt. 11) and subsequent Motion for a Preliminary Injunction (Dkt. 37). In the  
5 Court's recent order denying Plaintiffs' Motion for a Preliminary Injunction, the Court  
6 concluded, among other things, that Plaintiffs "failed to demonstrate a likelihood of  
7 success on the merits or that there are serious questions going to the merits." (Dkt. 37 at  
8 2, 8.) The Court reasoned that:

9 Here, unlike in *Janus*, the Plaintiffs entered into a contract with the Union  
10 to be Union members and agreed in that contract to pay Union dues for  
11 one year. "[T]he First Amendment does not confer . . . a constitutional  
12 right to disregard promises that would otherwise be enforced under state  
13 law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). A person  
14 has the right to contract away their First Amendment protections. *See Fisk*  
15 *v. Inslee*, 2017 WL 4619223 (W.D. Wash. Oct. 16, 2017). Plaintiffs'  
16 assertions that they didn't knowingly give up their First Amendment rights  
17 before *Janus* rings hollow. *Janus* says nothing about people [who] join a  
18 Union, agree to pay dues, and then later change their mind about paying  
19 union dues. . . . *Janus* does not apply to Plaintiffs' situation, as explained  
20 above. Plaintiffs' arguments to the contrary are unpersuasive.

21 *Id.* at 8-9. The relevant material facts are undisputed. Plaintiffs' attempts to avoid their  
22 contractual commitments are meritless as a matter of law. Defendants intend to seek  
23 summary judgment to resolve this case.

- 24
2. **A Proposed Deadline for Joining of Additional Parties.** The parties agree that the  
deadline for joining additional parties should be January 11, 2019. The parties further  
agree that if the Court denies class certification, Plaintiffs may add additional individual  
plaintiffs within twenty-one (21) days following the Court's order denying class  
certification.

1       **3. Consent to Assignment of Case to Magistrate Judge.**

2       No.

3       **4. Discovery Plan.**

4       The parties believe they may be able to avoid the need for discovery by agreeing to  
 5       stipulated facts to serve as the basis for cross-motions for summary judgment or partial  
 6       summary judgment. The parties are currently negotiating regarding those stipulated  
 7       facts. If the parties reach agreement on stipulated facts by November 30, 2018, they  
 8       intend to inform the Court and propose a briefing schedule for cross-motions for  
 9       summary judgment or partial summary judgment. The Discovery Plan below reflects the  
 10      parties' agreements regarding discovery if they do not reach agreement on stipulated facts  
 11      by November 30, 2018.

12      **A. Rule 26(a) Initial Disclosures:** The parties agree that, if discovery is necessary, the  
 13      deadline for Rule 26(a) Initial Disclosures should be December 14, 2018. The Court  
 14      has already extended this deadline to December 14, 2018 to provide time for the  
 15      parties to negotiate a set of stipulated facts for cross-motions for summary judgment  
 16      or partial summary judgment. (Dkt. 39.) If the parties do not reach agreement on  
 17      stipulated facts, the parties agree that December 14, 2018 should remain the deadline  
 18      for Rule 26(a) Initial Disclosures. If the parties do reach agreement on stipulated  
 19      facts, they will inform the Court and request that the Initial Disclosures deadline be  
 20      vacated.

21      **B. Discovery Subjects, Timing, and Potential Phasing:** The principal topics for  
 22      discovery, if necessary, include evidence related to Plaintiffs' allegations, claims,  
 23      request for class certification, and the nature and amount of damages to which  
 24

1 plaintiffs allege they and putative class members, if a class is certified, will be entitled  
2 if they are able to establish liability.

3 If the parties reach agreement on stipulated facts for cross-motions for summary  
4 judgment or partial summary judgment, discovery will not be necessary until after  
5 those cross-motions are resolved. If Defendants' anticipated motion for summary  
6 judgment is granted, the case will be resolved.<sup>1</sup> If Plaintiffs' anticipated motion for  
7 partial summary judgment is granted, discovery necessary for the resolution of the  
8 remaining issues in the action including, but not limited to, class certification, and the  
9 remaining, if any, merits issues such as damages, will be necessary.<sup>2</sup> The parties will  
10 meet and confer if such discovery becomes necessary after the Court resolves the  
11 cross-motions for summary judgment or partial summary judgment, and will propose  
12 relevant deadlines at that time.

13 If the parties do not reach agreement on stipulated facts by November 30, 2018,  
14 they will proceed with discovery on all issues, without phasing, and agree that the  
15 deadline for the close of discovery should be set as April 30, 2019. The parties  
16 reserve the right to request an extension of that deadline should the circumstances  
17 warrant it.

18 **C. Electronically Stored Information:** If discovery becomes necessary either because  
19 the parties do not reach agreement on stipulated facts or after the Court resolves the  
20 cross-motions for summary judgment or partial summary judgment, the parties will

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21  
22 <sup>1</sup> The parties reserve all rights of appeal. Plaintiffs specifically reserve the right to an appeal of  
any such decision and the right to seek class certification if an appeal is successful.

23 <sup>2</sup> Plaintiffs reserve the right to file an early class certification motion prior to the close of such  
24 discovery if and after their motion for summary judgment or motion for partial summary  
judgment is granted.

1 meet and confer with the intention to agree to an ESI protocol based on the Court's  
 2 Model Protocol for Discovery of ESI and will meet and confer and attempt in good  
 3 faith to reach agreement regarding any procedures and processes related to the  
 4 production of electronically stored information which are not in accord with the  
 5 Model Protocol for Discovery of ESI.

6 **D. Privilege Issues:** If discovery becomes necessary, the parties will meet and confer  
 7 with the intention to agree to a protective order based on the Court's Model Stipulated  
 8 Protective Order, which includes provisions related to privilege issues governed by  
 9 Federal Rule of Evidence 502, and will meet and confer and attempt in good faith to  
 10 reach agreement regarding any procedures and processes related to privilege issues  
 11 which are not in accord with the Model Stipulated Protective Order.

12 **E. Proposed Limitations on Discovery:** The parties believe the default discovery limits  
 13 under the Federal Rules of Civil Procedure should not be altered at this time. This  
 14 statement is without prejudice to the right of any party to seek relief from those  
 15 limitations should future circumstances warrant.

16 **F. Discovery Orders:** If discovery becomes necessary, the parties intend to meet and  
 17 confer regarding agreement to an ESI protocol and Protective Order based on the  
 18 Court's model protocol and protective order, as discussed above.

## 19 **5. Case Management Topics Under LCR 26(f)(1).**

20 **A. Prompt Case Resolution:** As discussed above, the parties believe they may be able  
 21 to avoid the need for discovery by agreeing to stipulated facts to serve as the basis for  
 22 cross-motions for summary judgment or partial summary judgment. The parties are  
 23 currently negotiating regarding those stipulated facts. If the parties reach agreement  
 24

1 on stipulated facts, they intend to inform the Court and propose a briefing schedule  
2 for cross-motions for summary judgment or partial summary judgment.

3 If Defendants' anticipated motion for summary judgment is granted, the case will  
4 be resolved. If Plaintiffs' anticipated motion for partial summary judgment is  
5 granted, discovery necessary for the resolution of the remaining issues in the action  
6 including, but not limited to, class certification, and the remaining, if any, merits  
7 issues such as alleged damages, will proceed.

8 If the parties do not reach agreement on stipulated facts by November 30, 2018,  
9 they will proceed to discovery. In that circumstance, the parties might file early  
10 dispositive motions, as well as early motions related to class certification. The parties  
11 reserve all available arguments that any early motion from the opposing party filed  
12 before discovery is completed is improper and should be denied. The parties agree to  
13 meet and confer by telephone or email before they file any class certification or  
14 dispositive motion to attempt in good faith to agree upon a briefing schedule for any  
15 such motion before it is filed and to allow the opposing parties a reasonable amount  
16 of time to discuss these matters before any such motions are filed.

17 **B. Alternative Dispute Resolution:** The parties do not currently believe that alternative  
18 dispute resolution would be fruitful.

19 **C. Related Cases:** The parties know of no related cases as defined in Local Civil Rule  
20 3(g).

21 **D. Discovery Management:** The parties see no need for a special master, Magistrate  
22 Judge, or other discovery management mechanism to facilitate discovery in this case  
23 at this time.  
24



1 **E. Anticipated Discovery Sought:** See the discussion of the subjects, timing, and  
2 potential phasing of discovery in section 4.B above.

3 **F. Phasing Motions:**

4 Cross-motions for summary judgment or partial summary judgment: As  
5 discussed above, the parties are currently negotiating regarding stipulated facts that  
6 would serve as the basis for cross-motions for summary judgment or partial summary  
7 judgment. If the parties reach agreement on stipulated facts by November 30, 2018,  
8 they intend to inform the Court and propose a briefing schedule for those cross-  
9 motions.

10 Class certification motions. If Defendants' anticipated motion for summary  
11 judgment is granted, the case will be resolved. If Plaintiffs' anticipated motion for  
12 partial summary judgment is granted, discovery necessary for the resolution of the  
13 remaining issues in the action including, but not limited to, class certification, and the  
14 remaining, if any, merits issues such as alleged damages, will occur, followed by  
15 resolution of class certification motions and then any remaining motions for summary  
16 judgment.

17 The Court's resolution of the legal issues that the parties expect would be  
18 presented in cross-motions for summary judgment or partial summary judgment could  
19 have a significant impact on plaintiffs' request for a class action. If the parties reach  
20 an agreement on stipulated facts on which to base cross-motions for summary  
21 judgment or partial summary judgment, the parties will request that the Court extend  
22 the current deadline for class certification motions set forth in Local Civil Rule  
23 23(i)(3) to one hundred (100) days following the ruling on the parties' cross-motions,  
24

1 if any class certification motions are necessary following that ruling. If the parties do  
2 not reach an agreement on stipulated facts by November 30, 2018, the parties will  
3 request that the Court extend the current deadline for class certification motions to  
4 thirty (30) days after the close of discovery.

5 Dispositive motions deadline. If the parties cannot agree to stipulated facts, the  
6 parties believe the deadline for dispositive motions should be the later of either thirty  
7 (30) days after the close of discovery or thirty (30) days after any class certification  
8 motions are resolved.

9 **G. Preservation of Discoverable Information:** The parties intend to comply with all  
10 requirements regarding preservation of discoverable information. Counsel have  
11 advised their clients of the requirements concerning preservation of discoverable  
12 information.

13 **H. Privilege Issues:** As discussed in section 4.D. above, if discovery becomes necessary  
14 either because the parties do not reach agreement on stipulated facts or after the Court  
15 resolves the cross-motions for summary judgment or partial summary judgment, the  
16 parties will meet and confer with the intention to agree to a protective order based on  
17 the Court's Model Stipulated Protective Order, which includes provisions related to  
18 privilege issues governed by Federal Rule of Evidence 502, and will meet and confer  
19 and attempt in good faith to reach agreement regarding any procedures and processes  
20 related to privilege issues which are not in accord with the Model Stipulated  
21 Protective Order.

22 **I. Model Protocol for Discovery of Electronically Stored Information ("ESI"):** As  
23 discussed in section 4.C above, if discovery becomes necessary, the parties will meet  
24

1 and confer with the intention to agree to an ESI protocol based on the Court's Model  
2 Protocol for Discovery of ESI and will meet and confer and attempt in good faith to  
3 reach agreement regarding any procedures and processes related to the production of  
4 electronically stored information which are not in accord with the Model Protocol for  
5 Discovery of ESI.

6 **J. Alternative to Model ESI Protocol:** As discussed above, if discovery becomes  
7 necessary, the parties will meet and confer and attempt in good faith to reach  
8 agreement regarding any procedures and processes related to the production of  
9 electronically stored information which are not in accord with the Model Protocol for  
10 Discovery of ESI.

11 **6. Discovery Completion Date.**

12 If the parties agree to a set of stipulated facts, discovery will be unnecessary until after  
13 the Court resolves the parties' anticipated cross-motions for summary judgment or partial  
14 summary judgment. After the Court resolves those anticipated cross-motions, the parties  
15 will meet and confer to determine if class-related and damages-related discovery is  
16 necessary and will propose relevant deadlines, if any, at that time.

17 If the parties do not reach agreement on stipulated facts by November 30, 2018, the  
18 parties propose that April 30, 2019 be set as the deadline for the close of discovery. The  
19 parties reserve the right to request an extension of that deadline should the circumstances  
20 warrant it.

21 **7. Case Bifurcation.**

22 The parties do not believe that any trial in this case should be bifurcated between liability  
23 and damages or in any other way. If this case is not resolved through dispositive  
24

1 motions, any trial evidence regarding the determination of potential damages would not  
2 be complex.

3 **8. Pretrial Statements and Order.**

4 The parties believe that, if trial is necessary, the pretrial statements and pretrial order  
5 called for by the Local Civil Rules will be necessary and appropriate and should not be  
6 dispensed with.

7 **9. Any other suggestions for shortening or simplifying the case.**

8 The parties do not have other suggestions for shortening or simplifying the case, beyond  
9 those discussed above regarding seeking to agree to stipulated facts on which to base  
10 cross-motions for summary judgment or partial summary judgment.

11 **10. The date the case will be ready for trial.**

12 As discussed above, if the parties cannot agree to stipulated facts, the parties believe the  
13 deadline for discovery should be April 30, 2019, the deadline for class certification  
14 motions should be thirty (30) days following the close of discovery, and the deadline for  
15 dispositive motions should be the later of either thirty (30) days after the close of  
16 discovery or thirty (30) days after any class certification motions are resolved. The  
17 parties anticipate that the case will be ready for trial within twelve (12) months of the  
18 filing of this Joint Status Report, but believe that a trial should not be scheduled until  
19 dispositive motions and class certification motions, if any, are resolved by the Court.  
20 Following the resolution of such motions, if a trial is necessary, the parties will meet and  
21 confer and file a joint report proposing trial-related dates.

22 **11. Jury or Non-Jury Trial.**

23 No party has demanded a jury trial.  
24

**12. Trial Days.**

If any trial is necessary, the number of trial days will be contingent upon whether this Court grants class certification and how the Court rules on dispositive motions. The parties will meet and confer on matters related to trial after this Court rules on dispositive motions and class certification motions. If a trial is necessary, the parties will propose dates related to a trial at that time.

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**14. Trial Counsel Problem Dates for a Trial Date.**

If any trial is necessary, trial-related dates will be contingent upon whether this Court grants class certification and how the Court rules on dispositive motions. The parties will meet and confer on matters related to trial after this Court rules on dispositive motions and class certification motions. If a trial is necessary, the parties will propose dates related to a trial at that time.

**15. Status of Defendants' Service.**

All Defendants have been served.

**16. Scheduling Conference Desirability Prior to Issuance of Scheduling Order.**

At this time, the parties do not see a need for a scheduling conference.

**17. Corporate Disclosure Statement.**

Defendant Washington Federation of State Employees, AFSCME Council 28 filed a Corporate Disclosure Statement on October 31, 2018. (Dkt. 40.)

DATED this 13th day of November, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel/parties of record. I hereby certify that no other parties are to receive notice.

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